

**MISSOURI COURT OF APPEALS
WESTERN DISTRICT**

COMPLETE TITLE OF CASE:

ROBERT T. VIVONA

Appellant

v.

KARL ZOBRIST, ET AL.

Respondents

DOCKET NUMBER **WD69244**

DATE: August 11, 2009

Appeal From:

Circuit Court of Jackson County, MO
The Honorable Jay A. Daugherty, Judge

Appellate Judges:

Division Three: Harold L. Lowenstein, P.J., Thomas H. Newton, C.J., and James E. Welsh, J.
Attorneys:

Robert L. Shirkey, Kansas City, MO

Counsel for Appellant

Attorneys:

Daniel J. Haus, Kansas City, MO

Counsel for Respondent

MISSOURI APPELLATE COURT OPINION SUMMARY
MISSOURI COURT OF APPEALS, WESTERN DISTRICT

ROBERT T. VIVONA, Appellant, v.
KARL ZOBRIST, ET AL., Respondents

WD69244

Jackson County

Before Division Three Judges: Lowenstein, P.J., Newton, C.J., and Welsh, J.

The Kansas City Missouri Police Department (the Department) hired Mr. Robert T. Vivona as a civilian employee in July 2001. At that time, he and his family lived in Lee's Summit, Missouri. Department policy required him to become a Kansas City resident by April 2002. Mr. Vivona's deadline to comply was extended to September 30. On October 15, the Department terminated his employment for noncompliance with the residency policy.

Mr. Vivona sought review and agreed to have his case heard before a hearing officer. The hearing officer recommended the Board of Police Commissioners (the Board) affirm the termination for noncompliance, but also recommended Mr. Vivona be reinstated for his attempts to comply. The Board affirmed Mr. Vivona's termination. Mr. Vivona appealed to the circuit court, which remanded the case to the Board. The Board again affirmed the termination. Mr. Vivona again appealed to the circuit court. The circuit court affirmed the Board's decision. Mr. Vivona appeals.

AFFIRMED.

Division Three holds:

Mr. Vivona first contests the Board's authority to delegate the hearing of his case to a hearing officer. Section 84.610 entitles civilian employees of the Department to have disciplinary matters heard by the Board. However, Mr. Vivona agreed to waive this right and have the case heard before a hearing officer. After Mr. Vivona appealed to this court; the Missouri Supreme Court held that a police officer could waive his right to a public hearing before the Board under section 84.600. Although that case dealt with section 84.600 and Mr. Vivona's hearing right is under section 84.610, we see no practical distinction between the two sections on this issue. Because Mr. Vivona waived his right to a hearing before the Board, his first point is denied.

In his second point, Mr. Vivona contends the Board did not have the authority to institute a residency requirement. The Board is a state agency created by statute and endowed with the

power to adopt rules and regulations governing the conduct of the police department. The statutes which deal with the Department do not cover all aspects of its governance and activities. Thus, its enabling statute, section 84.420, mandates, *inter alia*, that the Board set policies to fulfill its duties and adopt rules and regulations to govern the conduct of the police department. Here, we see no inconsistency between the Board's residency requirement for non-sworn civilian employees and its governing statutes. Mr. Vivona's second point is denied.

Mr. Vivona also argues that termination was not the appropriate discipline to impose because of mitigating evidence showing he attempted to comply. He asserts the Board was required to make specific findings about this evidence. However, the Board is not required to make specific findings as to mitigating evidence. It is required to set forth sufficient findings of fact on controlling issues to show that its decision was supported by substantial evidence and to allow the judiciary to perform its role of review. Our review, which is under an abuse of discretion standard, shows that the Board's order affirming Mr. Vivona's termination for noncompliance with the residency requirement was supported by substantial evidence. Mr. Vivona's third point is denied.

Finally, Mr. Vivona argues that the Board acted unreasonably by rejecting the hearing officer's reinstatement recommendation. However, the Board was not obligated to follow those recommendations. The Board retains its statutory authority for final decision-making, despite its delegation of the public hearing to a hearing officer. Moreover, the board resolution which establishes the procedure before a hearing officer specifically reserves final-decision making to the Board. Additionally, in his waiver Mr. Vivona acknowledged that he had been fully informed of these provisions and that he understood the final decision would be made by the Board. Because the Board did not abuse its discretion or act contrary to the law in declining to reinstate Mr. Vivona, Mr. Vivona's fourth point is denied.

Consequently, the Board's decision to terminate Mr. Vivona's employment is affirmed.

Opinion by: Thomas H. Newton, C. J.

August 11, 2009

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